No. 85-1086

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1985

ANDRES FELIPE RODRIGUEZ, and

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the criminal *in personam* forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1963, as originally enacted in 1970, incorporated the so-called "relation-back doctrine" and, if so, whether the doctrine violates due process by either: (A) creating an irrebuttable presumption that the defendant still possesses forfeitable assets at the time of the indictment or trial, or, at the very least, (B) shifting the burden of persuasion to the defendant to prove that he does not still possesses forfeitable assets at the time of his indictment or trial?

II. Whether a "summary" government witness may, consistent with due process, be allowed to repeatedly express expert opinions and conclusions of the law about central issues in a criminal case and thereby subvert the jury's function to determine a defendant's guilt or innocence based on the evidence?

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OPINIONS BELOW

The Final Judgment of Forfeiture of the United States District Court for the Southern District of Florida appears in Appendix A, attached hereto. The district court's Order Containing Finding of Facts and Conclusions of Law appears in Appendix B, attached hereto. The decision of the United States Court of Appeals for the Eleventh Circuit, 770 F.2d 959, affirming the district court's Final Judgment and Order appears in Appendex C, attached hereto. The Order of the United States Court of Appeals for the Eleventh Circuit denying petitioner Andres Rodriguez' Petition for Rehearing and Rehearing En Banc appears in Appendix D, attached hereto.

JURISDICTION

The Order of the United States Court of Appeals for the Eleventh Circuit denying rehearing was entered on October 21, 1985. This Petition is filed within sixty (60) days of that ruling. Jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Clause four of AMENDMENT V to the United States Constitution provides:

> No person shal ... be deprived of life, liberty, or property, without due process of law.

The Organized Crime Control Act of 1970, Pub. L. No. 94-452, tit. IX, § 901(a), 84 Stat. 943 (18 U.S.C. § 1963 prior to amendment), is set out in Appendix E, attached hereto.

The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 302, 98 Stat. 1837, 2040 (amending 18 U.S.C. § 1963), is set out in Appendix F, attached hereto.

STATEMENT OF THE CASE

The Trial Testimony

Petitioner, Andres F. Rodriguez, was charged along with five co-defendants on April 19, 1982 in a fourteen count indictment with conspiracy and mail and wire fraud in violation of 18 U.S.C. §§ 371, 1341 and 1342, respectively. Andres Rodriguez was further charged with having conducted of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962(c). The "enterprise" was defined as an "association-in-fact" of ten enumerated financial institutions and corporations. Mr. Rodriguez was charged with operating these entities between August 5, 1977 and October 24, 1978, through a "pattern" of fraudulent activities.

A "Forfeiture Notice" was also included in the indictment which listed eleven specific alleged "interests" of Mr. Rodriguez that the government sought to forfeit under 18 U.S.C. § 1963.

The Petitioner's trial took place between January 27 and February 15, 1983. The government showed that between 1977 and early 1978, Mr. Rodriguez and other investors negotiated the purchase of the Popular Bank and Trust Company and the Northside Bank. Before both banks were closed in 1978, they made loans to various corporations in which Mr. Rodriguez was involved at the time as an officer or as an authorized signature on corporate checking accounts. Although the government did not establish who the shareholders were of these corporations, the government's theory was that Mr. Rodriguez owned or control all the corporations as "a practical matter" and that he was utilizing his hidden power to loot the

banks for his own benefit.[1]

The government's proof "consisted primarily of the checks and loan documents." United States v. Navarro-Ordas, 770 F.2d at 967. The government's star witness was the government's case agent, Special Agent Cooper. Agent Cooper was introduced to the jury by the prosecutor during opening statements as (1) the "case agent"; (2) the individual who "collected the evidence"; (3) "a witness for you"; and (4) "the only witness you will see in this courtroom throughout the entire trial."[2] Further, the prosecutor discouraged the jury from independently reviewing the documents by urging them not "to become financial wizards." Instead, the prosecutor encouraged them to listen to Agent Cooper, who would "try to alleviate some of this problem for you."[3]

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1 Trial Transcript, V. 20, p. 1597.

2 Trial Transcript, V. 12, p. 6, 52.
(Footnote Continued)

The government also prepared and admitted a number of charts utilized by Agent Cooper during his testimony. The government's use of the charts and Agent Cooper's testimony followed a pattern. Agent Cooper would be asked to summarize each loan transaction and give his conclusions about where and to whom the money went. He would then list, loan by loan, which documents in evidence allegedly supported his conclusions.

Although never qualified as an expert in corporate or banking matters,[4] the opinions Agent Cooper gave involved conclusions from the evidence that were in actual dispute at trial. For example, although on cross-examination Agent Cooper

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3 Trial Transcript, V. 12, p. 6, 52.

4 Agent Cooper, in fact, was unqualified as an expert. He had only a Bachelor of Science degree in accounting. When cross-examined about his general knowledge of corporate and financial affairs, he admitted that "[y]ou are getting a little out of my field" and "I would not have that intimate knowledge." Trial Transcript, V. 19, p. 1547-58.

conceded that he did not have documents to prove Mr. Rodriguez' past or present stock ownership of most of the corporate entities at issue, he was nevertheless repeatedly permitted to testify, in his neutral, "summary witness" capacity, that Mr. Rodriguez in fact "controlled" the various corporate entities as a "practical matter," that Mr. Rodriguez "conducted all the business of these corporations" and that a particular company "is another company of Mr. Rodriguez."[5] Agent Cooper concluded his testimony with a final "summary of his summary" in which he made broad-based conclusions about what the evidence showed in

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[5] Trial Transcript, V. 19, p. 1445, 1496, 1504-05; V. 20, p. 1514, 1522, 1523, 1535-36, 1597; V. 21, p. 1831-32 (emphasis added). Similarly, Agent Cooper was allowed to testify, not only about what allegedly took place concerning the various financial transactions, but why they took place. Thus, he testified that, in his opinion, the documents were prepared by the defendants in certain ways "because" that would further the fraudulent scheme. Trial Transcript, V. 19, p. 1449.

language parrotting the language of the indictment itself.[6] The charts themselves were also not neutral summaries of all the evidence but contained only the government's version of events.[7]

On February 15, 1983, Mr. Rodriguez was found guilty of conspiracy, mail and wire fraud, and racketeering. With the agreement of the government, however, the forfeiture proceeding was continued to a later date to be heard by the district court, without a jury.

The Forfeiture Trial

On March 3, 1983, the district court heard evidence on the forfeiture aspect of the racketeering charges. Agent Cooper's

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6 Trial Transcript, V. 19, p. 1534-36. In closing argument, the prosecutor acknowledged the similarity, inviting the jury to pay close attention to the charts and summary exhibits "tracking the indictment." Trial Transcript, V. 23, p. 4201.

7 Trial Transcript, V. 19, p. 1472-73; V. 20, p. 1596.

"summary" testimony was equally critical to the government's forfeiture claims. While Agent Cooper calculated that the combined total of all loans made during Mr. Rodriguez' tenure at the Popular and Northside banks amounted to approximately $2.9 million, he could trace only $365,827 to companies associated with Mr. Rodriguez that were in existence even as long ago as 1978.[8] At the time of trial in 1983, Agent

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[8] Trial Transcript, V. 20, p. 1535-36. The remaining loan proceeds were either not traced at all to any current assets or were traced to loans that had been used to pay off other loans. For example, as noted in the panel opinion, Mr. Rodriguez used a $1.3 million loan from the Popular bank as part of the $3 million purchase price for the Northside Bank. United States v. Navarro-Ordas, 770 F.2d at 962-64. See also Trial Transcript, V. 16, p. 711-13. Another $1.3 of the purchase price came from a loan obtained from the Bank of Miami and secured by the full $3 million worth of Northside bank stock. Trial Transcript, V. 17, p. 815. The Bank of Miami eventually foreclosed on its $1.3 loan, repossessed the entire $3 million in stock and took control of the bank. Even though the government traced $1.3 million from the Popular Bank to the Bank of Miami, the government required Mr. Rodriguez to "forfeit" yet another $1.3 million, thereby unjustly enriching the Bank of Miami.

Cooper testified that he did not know which corporations, if any, were still active. He also testified that he did not know if any of the loans had been repaid.[9] Rather, the government contended that tracing of loans to Mr. Rodriguez at the time of the trial was unnecessary. "It was not essential to the investigation to trace it past the receipt into Mr. Rodriguez' and Mrs. Rodriguez hands."[10]

The government also did not attempt to trace the proceeds of the activity in 1977 and 1978 to any assets belonging to Mr. Rodriguez existing in 1983.[11] Indeed, the prosecutor reiterated that "the tracing is

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9 Compare Trial Transcript, V 20, p. 1536, with V. 20, p. 1588-89.

10 Trial Transcript, V. 20, p. 1603.

11 Forfeiture Transcript, p. 69-90. Agent Cooper again testified for the government. When asked what Mr. Rodriguez' present ownership interests were, if any, in the companies, he stated that "I could only guess." Id. at p. 102.

really irrelevant."[12] The prosecutor argued that, instead, the burden should be placed on Mr. Rodriguez to prove that he "had divested himself of interest in this property."[13] This was so, according to the prosecutor, because the forfeiture "related back" to the time the loans were first made and received by Mr. Rodriguez or companies associated with him.[14] In issuing its forfeiture order, the district court expressly adopted the government's position and held that Mr. Rodriguez was "personally liable for that dollar amount from his current assets" regardless of whether or not the loan proceeds still existed in any form. Accordingly, Mr. Rodriguez was ordered to pay a "personal money judgment" of

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12 Forfeiture Transcript, p. 150-151.

13 Forfeiture Transcript, at p. 12.

14 Forfeiture Transcript, p. 12. Mr. Rodriguez argued that only presently held assets could be subject to forfeiture.

$3,203,045.42. See Final Judgment of Forfeiture and Order Containing Findings of Fact and Conclusions of Law As To RICO Forfeiture on April 9, 1984, attached hereto as Appendices A and B.[15]

The Eleventh Circuit's Decision

On March 29, 1983, Mr. Rodriguez was sentenced to a total of six years imprisonment and a $15,000.00 fine. Appeals were taken separately from both the underlying conviction and the forfeiture order. The cases were later consclidated, and on September 10, 1985, the United States Court of Appeals for the Eleventh Circuit affirmed the conviction and forfeiture order.

The Court of Appeals did not discuss the propriety of the government's use of

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[15] The government conceded that $262,012.35 should be deducted from the figure originarlly tabulated. The panel agreed and remanded the case to the district court to adjust the amount of the forfeiture order to $2,940,984.10. United States v. Navarro-Ordas, 770 F.2d at 770-771.

Agent Cooper as a summary witness. Concerning the forfeiture order, the Court of Appeals held that "[t]o carry out Congress' intent, a court must order forfeiture of the amount of the [gross] profits and place the burden of satisfying the order on the convicted defendant, regardless of what he may actually have done with his profits." United States v. Navarro-Ordas, 770 F.2d 959, 970. The Court of Appeals found that this conclusion was compelled by this Court's decision in Russello v. United States, 464 U.S. 16 (1983). Navarro-Ordas, 770 F.2d at 969-970.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED, BECAUSE THE "RELATION-BACK" DOCTRINE IS BARRED BY PRINCIPLES OF STATUTORY CONSTRUCTION AND LEGISLATIVE INTENT, AND DUE PROCESS

A. The Writ Should Be Granted To Resolve the Conflicts and Confusion Among the Federal Courts

As in any criminal case, the burden of proving the forfeiture count of a RICO indictment is on the government. In Re Winship, 397 U.S. 358, 361 (1970). See Advisory Committee Notes to Fed. R. Crim. P. 31(e) (1972 amendment)("[t]he assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved"). As the Eleventh Circuit itself held in United States v. Garrett, 727 F.2d 1003, 1012 (11th Cir. 1984), it, therefore, "follows that under the Sixth Amendment, a criminal defendant is entitled to a

jury trial on the issue whether a particular asset is forfeitable." Similarly, in United States v. Rubin, 559 F.2d 975, 993 (5th Cir. 1977), cert. denied, 444 U.S. 864 (1979), the Fifth Circuit held that the forfeiture provisions of RICO, at least as then drafted, were limited in scope to reach only "presently-held interests."

Despite these principles, three Circuits have now held that that the criminal, in personam forfeiture provisions of RICO as originally drafted in 1970 apply, not only to interests held at the time of the defendant's conviction, but to the gross tabulation of illicit proceeds ever received from the racketeering activity: (1) the Eleventh Circuit in this case, United States v. Navarro-Ordas, 770 F.2d 959 (11th Cir. 1985), and United States v. Conner, 752 F.2d 566 (11th Cir. 1985);[16] (2) the Seventh

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[16] A total of only four judges from the Eleventh (Footnote Continued)

Circuit in United States v. Ginsburg, 773 F.2d 798 (7th Cir. 1985)(en banc);[17] and (3) the Second Circuit in United States v. Lizza Industries, Inc., No. 84-1449 (2d Cir. October 21, 1985), 38 Cr.L. 2134 (November 13, 1985).[18]

The 1985 decisions in Navarro-Ordas, Conner, Ginsburg and Lizza Industries,

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Circuit actually sat on these two panels. Each panel consisted of two judges from the Eleventh Circuit and one visiting judge. Indeed, despite expressly recognizing the existence of the Eleventh Circuit's decision in Conner, the Honorable James C. Paine refused to order some of a defendant's property forfeited on the grounds that the government had shown a nexus only between some of his property and the activities of the enterprise. United States v. Ragonese, 607 F. Supp. 649, 652 (S.D. Fla. 1985). In simply calculating a personal money judgment, the forfeiture order affirmed by the panel in this case did not require the government to show any connection between the activities of the enterprise and particular property deemed forfeited.

[17] In Ginsburg, the Seventh Circuit reversed three prior panel decisions within the Circuit. See United States v. Alexander, 741 F.2d 962 (7th Cir. 1984); United States v. McManigal, 723 F.2d 580 (7th Cir. 1983) (McManigal II); United States v. McManigal, 708 F.2d 276 (7th Cir.), vacated, 104 S.Ct. 419 (1983)(McManigal I).

[18] Judge Van Graffeiland dissented from the majority opinion in this case.

however, are contrary to the decisions of every other district and circuit court that had considered the propriety of imposing the "relation-back" doctrine into contemporary criminal jurisprudence prior to Congressional amendments to RICO in 1984. See United States v. Alexander, 741 F.2d 962, 967-68 (7th Cir. 1984); United States v. McManigal, 708 F.2d 276 (7th Cir. 1983), vacated on other grounds, ___ U.S. ___, 104 S.Ct. 419, affirmed on remand, 723 F.2d 580 (7th Cir. 1983); United States v. Veliotis, 586 F. Supp. 1512, 1518-19 (S.D.N.Y. 1984); United States v. Ambrosio, 575 F. Supp. 546, 550 (E.D.N.Y. 1983); United States v. Veon, 549 F. Supp. 274, 280-84 (E.D. Cal. 1982); United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Penn. 1977). See also United States v. Zang, 703 F.2d 1186, 1195 (10th Cir. 1982)("[t]he government presented precise, uncontroverted evidence as to the amount of racketeering income funnelled

into" the enterprise; only partnership interest traced to building subject to forfeiture). Cf. United States v. Rogers, 602 F. Supp. 1332, 1341 (D. Colo. 1985) ("[b]efore amendment, § 1963 was properly interpreted to provide for the post-conviction seizure of all assets which are still in existence and traceable to racketeering activity"). See generally Reed & Gill, RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process, 62 N.C. L. Rev. 57, 99 & n. 287 (1983) ("[i]f property no longer belongs to the defendant on the day of the indictment, it is not an 'interest' of the defendant subject to forfeiture" because "upon forfeiture of an asset, the government can only step into the shoes of the defendant").

In reaching its erroneous conclusion, the Eleventh Circuit in Navarro-Ordas, as well as the courts in Connor, Ginsburg and Lizza Industries, misconstrued the RICO

statute as originally drafted and this Court's decision in Russello v. United States, 464 U.S. 16 (1983), interpreting it. In Russello, the defendants were convicted of a pattern of racketeering activity which consisted of arranging the arson of the defendant's own buildings to collect unreasonably high insurance claims. The insurance proceeds were then reinvested in new buildings, which in turn were torched to obtain more insurance money. The Court held that the forfeitable "interests" in 18 U.S.C. § 1963(a)(1) encompassed insurance proceeds from the arson fraud. "We simply hold that the "interests" subject to forfeiture under § 1963(a)(1) are not limited to interests in an enterprise." United States v. Russello, 104 S.Ct. at 304 n.3. Under the Court's holding, the government could seize new buildings legitimately acquired with the traced insurance proceeds as well as the rents derived from those buildings.

If the government could not trace the insurance proceeds to new buildings or if the buildings were all destroyed, Russello provides no guidance concerning the continued availability of forfeiture. Indeed, the Court itself underscored the limited nature of its holding, cautioning that "we have not resolved any ambiguity that might be inherent in the terms 'profits' and 'proceeds'" and that "[o]ur use of those terms is not intended to suggest a particular means of calculating the precise amount that is subject to RICO forfeiture in any given case." Id.

In interpreting the term "interests," however, the Supreme Court emphasized that term should be given its ordinary, dictionary definition. 104 S.Ct. at 299 (citing Black's Law Dictionary and Random House Dictionary). Just as the term "forfeit" ordinarily implies that something still exists to forfeit, the term "interest"

itself denotes "'a right, claim, title or legal share in something.'" United States v. Russello, 104 S.Ct. at 299 (quoting Black's Law Dictionary)(emphasis added). See United States v. Alexander, 741 F.2d 962, 967-68 (7th Cir. 1984).

B. The Decision By the Court of Appeals Conflicts With the History of Criminal Forfeitures and the Legislative History of RICO Forfeiture

Moreover, in ruling that the "relation-back" doctrine applied to criminal in personam forfeitures such as RICO, the Court of Appeals ignored the historic roots of the doctrine that, even in medieval times, limited the doctrine to civil, in rem cases.[20] Similarly, in approving a for-

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[20] Since in personam forfeitures did not vest until conviction even at common law, The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827), the forfeiture of the personalty itself did not date back to the date of the offense, but rather also dated from the time of conviction. 4 Blackstone Commentaries on the Laws of England, 354, 388 (1765).

feiture order that permits the government to substitute any of Mr. Rodriguez' assets for those initially obtained, the Court of Appeals ignored the fact in recently amending RICO, Congress ultimately rejected such a substitution of asset provision. See Pub.L. 98-473, Title II, § 2301(b), Oct. 12, 1984, 98 Stat. 2192, repealing, H.J.Res. 648-204 amending § 1963(d). The Court of Appeals also disregarded the fact that even high ranking government officials interpreted the RICO as originally drafted as requiring tracing of assets to present forms. Indeed, these perceived limitations of the original statute provided the primary impetus for the 1984 amendments.[21]

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21 The Department of Justice had been lobbying Congress since at least 1980 to amend RICO to include the "relation-back" and substitution of asset provisions by expressly arguing that RICO as originally drafted did not encompass these doctrines. See, e.g., Hearings on Forfeiture of Narcotics Proceeds Before the Subcomm. on Criminal Justice, Senate Comm. on the Judiciary, 96th Cong., 2d Sess. (1980), at 115 ("the accurate tracing of (Footnote Continued)

C. The Decision By the Court of Appeals Conflicts With Established Court Precedents

Finally, the Court of Appeals' application of a "relation back" theory to RICO's criminal forfeiture provisions effectively shifted the burden to the petitioner during the forfeiture proceeding in violation of his right to due process. The "relation-back" doctrine stems from the legal fiction permitted in civil in rem forfeitures at common law that illegally used or acquired property is itself "guilty" and thus vests in the government at the time of its illegal use or acquisition. See generally Calero-Toledo v. Pearson Yacht Leasing Co., 416

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money flows is necessary to prove the defendant's assets are criminal and subject to forfeiture") (Testimony of Deputy Assistant Attorney General, Criminal Division, Department of Justice, Irvin F. Nathan); Hearings on S. 2320 Before the Comm. on the Judiciary, April 23, 1982, at 39 (changes in the law were "very important" because "the current statute does not reach substitute property") (Testimony of Jeffrey Harris, Deputy Associate Attorney General).

U.S. 663, 683 (1974). When implanted into an in personam, criminal context such as RICO, however, the doctrine lifts the tracing burden of proof entirely from the government by creating an irrebuttable presumption that the defendant still possesses the property. The defendant replaces the property in the new legal fiction and is deemed guilty for the forfeiture from the moment he first received the property. And, under the Court of Appeals' theory, even proof that he, in fact, no longer possessed the property at the time of indictment or trial would be irrelevant, since, in that event, a personal money judgment would be imposed in its place. Such mandatory presumptions violate due process. See County Court of Ulster Cty. v. Allen, 442 U.S. 140 (1979). Even if the presumption created by the doctrine could be construed as rebuttable, it would still violate due process, because it impermissibly shifts the

burden of persuasion to a defendant to prove a negative -- that "presently-held interests," United States v. Rubin, 559 F.2d at 993, no longer exist. Since proof of such interests is part of the government's burden in a criminal case, due process is violated. In Re Winship, 397 U.S. 358, 361 (1970).

II. THE WRIT SHOULD BE GRANTED TO ENSURE THAT FEDERAL COURTS TRY DEFENDANTS UPON THE EVIDENCE AND NOT UPON THE OPINIONS OF UNQUALIFIED GOVERNMENT EXPERTS

The trial court is vested with a certain degree of discretion in admitting summary charts into evidence, pursuant to FRE 1006. United States v. Atchley, 699 F.2d 1055, 1059 (11th Cir. 1983). However, in Gordon v. United States, 438 F.2d 858, 876 (5th Cir. 1971), the Fifth Circuit emphasized "that a trial court is charged with grave responsibilities to make certain that an accused is not unjustly convicted in a 'trial by charts.'" (Citations omitted.)

The "inherent danger" of permitting overly suggestive and conclusory charts and summary testimony is that "'[a] jury may be unduly impressed by the apparent authority of a government witness' chart computation, as such, rather than the truth and accuracy of the underlying facts and figures supporting them.'" 438 F.2d at 876 (quoting Baines v. United States, 426 F.2d 833, 840 (5th Cir. 1970))(emphasis added by the Court in Gordon). Similar cautions are necessary when other forms of summary evidence is introduced. See United States v. Brown, 548 F.2d 1194, 1205 n. 20 (5th Cir. 1977)(plain error for IRS investigator to give opinion on "the ultimate fact" at issue); Flemister v. United States, 260 F.2d 513, 517 (5th Cir. 1958)(reversing tax conviction where summaries introduced represented only government's view of facts). The risk of "unduly impressing" the jury was especially great in this case because of the multitude

of roles Agent Cooper was allowed to play.

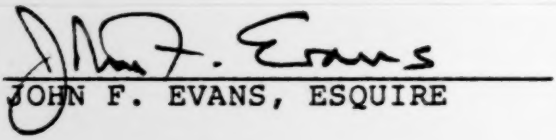
Supreme Court review is warranted, because this case presents a fundamentally important question concerning the government's use of non-expert, summary witnesses in criminal trials within the federal system. Permitting the government to present its case through a witness such as Agent Cooper undermines the Federal Rules of Evidence and creates enormous prejudice and insurmoutable problems for criminal defendants during cross-examination. On the one hand, the witness is allowed to give opinions about ultimate issues in the case, but when pressed on cross-examination is allowed -- <u>because</u> he is <u>not</u> an expert -- to, in effect, hide behind his lack of expertise. If the Federal Rules of Evidence are not strictly adhered to in this area, the entire complexion of a trial can be dramatically altered. A defendant's Sixth Amendment right of confrontation and Fifth

Amendment right to due process is undermined. Yet, review is evaded under the rationale that evidentiary rulings are generally discretionary. The writ should be granted to place the necessary limits on such practices.

CONCLUSION

For the foregoing reasons, the petitioner requests that the Court issue a Writ of Certiorari to review the judgment and order of the United States Court of Appeals For the Eleventh Circuit.

Respectfully submitted,



JOHN F. EVANS, ESQUIRE

G. RICHARD STRAFER, ESQUIRE
ZUCKERMAN, SPAEDER, TAYLOR
& EVANS
Gables Corporate Plaza
Suite 1100
2100 Ponce de Leon Boulevard
Coral Gables, FL 33134
Telephone: (305) 444-1911

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 6th day of December, 1985 to: (1) The Solicitor General, Department of Justice, Washington, D.C. 20530; and (2) Juan C. Marrero, Attorney, Asset Forfeiture Office, Criminal Division, Department of Justice, P.O. Box 521, Ben Franklin Station, Washington, D.C. 20044.

John F. Evans

APPENDIX A

UNITED STATES DISTRICT
COURT SOUTHER DISTRICT
OF FLORIDA

CASE NO: 82-197-CR-JWK

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANDRES F. RODRIGUEZ,

Defendant.

FINAL JUDGMENT OF FORFEITURE

On February 15, 1983, the defendant, Andres F. Rodriguez, was convicted by a jury of violating Title 18, United States Code, §1962(c). The Court sitting alone as the trier of facts received evidence concerning forfeiture on March 3, 1983. Thereafter, having considered the memoranda of law submitted by the parties, and having heard oral argument of counsel, the Court pursuant to Rule 23(c), Federal Rules of Criminal Procedure made certain findings of fact and

conclusions of law declaring certain interests and properties held by the defendant to be forfeiture to the United States Code, §1963. the Court also concluded that the forfeiture is a personal action against the defendant himself and is not limited solely to property involved in the criminal enterprise.

Accordingly, based upon the findings of fact and conclusions of law, it is hereby ORDERED AND ADJUDGED that:

1. The amount of $3,203,045.42 is hereby forfeited and that judgment in that sum in hereby granted in favor of the United States of America and against the defendant, Andres F. Rodriguez, for which let execution issue.

2. The defendant's interest and property rights in:

a. Kohly Shopping Center
2742 S.W. 8th Street
Miami, Florida

b. Kohly Motor Credit Corp. Property, located at 5749 S.W. 8th St. Miami, Florida

c. Tall Pines Trailer Park 4250 S.W. 8th Street Miami, Florida

d. Gables-At-Miller Lots # 2, 3, 7, 9, 10, 11, 13, 15, 18, 20, 23, 25, 32, 36, 38, 39, 47, 57, 58, 59,61, 62, and 63, Block 1, Gables Edge, recorded in Plat Book 94, page 54, Dade County located at approximately 58th Avenue and Miller Road, Miami, Florida

are hereby forfeited and the defendant, Andres F. Rodriguez is hereby divested of his right, title and interest in said properties and all such rights, titles and interests in said property are hereby forfeited to the United States of America.

3. The Attorney General, or his designate, shall determine the fair market value of the properties described in paragraph 2 above and said value will be applied to the judgment of $3,203,045.42 against the defendant, Andres Rodriguez

described in paragraph 1, above. Should the fair market value be less than $3,203,045.42, an equitable lien is hereby imposed and the defendant, Andres F. Rodriguez is hereby ordered to pay the deficit to the United States of America in cash. Should the fair market value exceed the judgment of $3,203,045.42 a constructive trust is hereby imposed and the defendant, Andres F. Rodriguez shall be released from the execution issued in paragraph 1, above.

4. The defendant's ownership interests in the following business entitles are as follows:

1. 100% - Popular and Trust Company, Limited
2. 58% - Northside Bank of Miami
3. 100% - Capital Holdings Company, S.A.
4. 100% - Capital National Investment Corporation
5. 100% - Capital Holding Investment Corporation

6. 100% - North America Warranty Investment Corporation

7. 100% - Security International Insurance Company

8. 100% - Kohly Motor Credit Corporation

9. 100% - Kohly Motors Corporation

10. 100% - Gables-At-Miller Corporation

11. 100% - First National Mortgage Bank, N.A.

12. 100% - North American Bank and Trust Co., N.V.

The defendant, Andres F. Rodriguez is hereby divested of his inchoate ownership interests or stock ownership interest and said interests are hereby forfeited to the United States of America.

5. The defendant, Andres F. Rodriguez is hereby ordered to divest himself of all controlling influence over the business entitles listed in paragraph 4 and shall resign any position as an officer or director of those entities.

6. The Attorney General, or his designate, is authorized pursuant to Title 18, United States Code, §1963 to seize all properties and interests which have been declared forfeited to the United States of America in this Order and Judgment of Forfeiture and shall dispose of all such property as soon as commercially feasible, making due provisions for the rights of innocent persons. All provisions of law relating to the disposition of property, or proceeds from the sale thereof, or the remission or mitigation of forfeitures for violations of the customs laws, and the compromise of claims in respect of such forfeiture shall apply to forfeitures incurred under this Order, insofar as applicable and not inconsistent with the provisions of Title 18, United States Code, §1963.

7. The Attorney General, or his designate, may appoint a trustee or receiver

of particular expertise as necessary to operate any ongoing business or to protect and preserve any properties, interests or assets, which have been declared forfeited to the United States of America in this Order and Judgment of Forfeiture.

8. In addition to any discovery and procedural methods available to enforce judgments, the attorneys for the Government shall have the right to compel the production of documents and the attendance of witnesses to take deposition of testimony from all persons, including the defendant, who may possess information as to any assets and liabilities of the defendant, Andres F. Rodriguez.

9. No later than twenty (20) days from the date of this Order, the defendant, Andres F. Rodriguez shall provide the Court and counsel for the Government with a full and complete financial statement of all his assets and holdings, including: all

receivables, properties, rights, titles, and all such other interests and things of value, as well as the source, type, amount or value of all income, which the defendant now holds or will receive during the twelve (12) month period immediately following the date of this Order.

10. The restraining order entered by this Court in June, 1982, shall continue to remain in full force and effect.

11. The defendant, Andres F. Rodriguez, shall have thirty (30) days from the date of this Order to attempt to obtain a stay of its provisions. Absent a grant of a stay by the United States Court of Appeals for the Eleventh Circuit within that period, the forfeitures ordered herein will take effect upon the expiration of that time.

DONE AND ORDERED in Chambers in Miami, Florida this _____ day of _____, 1984.

JAMES W. KEHOE
UNITED STATES DISTRICT
JUDGE

copies furnished to:

Carol Wilkinson, Esq., AUSA
James D. McMaster, Esq.
Ronald Polk, Esq. FPD
Edward H. Carhart, Esq.
Jose Larraz, Jr., Esq.
John W. Perose, Esq.

APPENDIX B

UNITED STATES DISTRICT
COURT SOUTHERN DISTRICT
OF FLORIDA

CASE NO: 82-197-CR-JWK

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANDRES F. RODRIGUEZ,

Defendant.

/

ORDER CONTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO RICO FORFEITURE

INTRODUCTION

Following a jury trial, the defendant, Andres F. Rodriguez, was convicted on February 15, 1983, of participating in the conduct of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c),, the RICO statute. After the return of the jury's verdict on all other counts of the indictment, the United States and the Defendant waived a further determination by the jury on the RICO

forfeiture issue contained in Count 13 in favor of a judicial determination.

Accordingly, on March 3, 1983, the Court held a hearing on the RICO forfeiture issue raised in Count 13. At the hearing, the Court incorporated all prior proceedings into its consideration on this forfeiture matter. Pursuant to Rule 23,(c) of the Federal Rules of Criminal Procedure, the Court makes its findings of fact and conclusions of law based on the evidence and the arguments of counsel presented at the trial of this case and at the post-trial hearing on the forfeiture issue.[1]

FINDINGS OF FACT

1. The criminal penalty of forfeiture sought by the Government is alleged in Count 13 of the Indictment. In finding the Defendant guilty of participating in a racketeering enterprise, the jury implicity found that various corporations were part of

that criminal enterprise.

2. The Defendant's interests that are subject to forfeiture are as follows:

Popular Bank and Trust Company, Ltd.

Northside Bank of Miami

Capital Holding Company

Capital National Investment Corpcration

North America Warranty Investment Corporation

Security International Insurance Company

Kohly Motor Credit Corporation

First National Mortgage Bank, N.V.

North America Bank and Trust Company, N.V. Netherland Antilles

Capital Holding Investment

Gables-At-Miller Corporation

Kohly Motors Corporation

3. One aspect of defendant's culpability at trial concerned the fact that defendant procured certain fraudulent loans

from some of the corporations that he personally controlled. He exercised his control over these corporations to enrich himself illegally through a series of complicated financial transactions.

4. Two banks owned and controlled by the defendant, the Popular Bank and Trust Co., Ltd., and the Northside Bank of Miami, lent large sums to the defendant as part of a fraudulent scheme. Specifically, these banks, which the jury found to be parts of the criminal enterprise, extended loans and overdrafts of $3,203,045.42. to the defendant.

5. The defendant also owed two other banks, the First National Mortgage Bank, N.V., and the North American Bank and Trust Company, which the jury considered to be part of the criminal enterprise. These two banks furnished fraudulent collateral for loans made to the defendant through his corporations and business entitles which

also constituted part of the criminal enterprise.

6. The Capital Holding Company, S.A., Capital National Investment Corporation, Security International Insurance Company, North America Warranty Investment Corporation, all parts of the criminal enterprise, received the proceeds of these fraudulently obtained loans.

7. Kohly Shopping Center, located at 2742 S.W. 8th Street, Miami, Florida, was owned by Capital National Investment Corporation. Moreover, Kohly Shopping Center was constructed and operated through the use of loan proceeds obtained from the Popular Bank and Trust Company, Ltd., and the Northside Bank of Miami.

8. Loan proceeds fraudulently obtained from the Popular Bank and Trust Company, Ltd. and the Northside Bank of Miami were directly and indirectly traced to the development and operation of the Kohly

Shopping Center. Since both of these banks constituted part of the criminal enterprise here at issue, Kohly Shopping Center also therefore became part of the criminal enterprise as defined in Court 13 of the indictment.

9. Throughout 1977 and 1978, Kohly Motors Corporation, a Florida corporation, conducted no business. Kohly Motors Corporation was, in effect, merely a checking account used by Andres Rodriguez to pay Kohly Shopping Center expenses.

10. Kohly Motors Credit Corporation, which owned property located at 5749 S.W. 8th Street, Miami, Florida, was part of the criminal enterprise defined in Count 13 herein. Kohly Motors Credit Corporation was part of the defendant's racketeering scheme in that the corporation borrowed $76,649.95 from the Northside Bank of Miami, which was also part of the criminal enterprise. The proceeds of this Northside Bank loan was

received directly by the defendant. The defendant owned a 100% ownership interest in Kohly Motors Credit Corporation.

11. Kohly Motor Credit Corporation and the Kohly Motors Corporation were used interchangeably by the defendant as part of the criminal enterprise and were corporations in name only.

12. Capital Holding Company, S.A., was not a legal entity, but was an association in fact, owned and operated by the defendant as part of the criminal enterprises as defined in Count 13 of the indictment.

13. The defendant had 100% ownership interest in Capital National Investment Corporation, which was part of the criminal enterprise as defined in Count 13. In turn, Capital National Investment Corporation owned the Kohly Shopping Center in Miami, Florida.

14. Capital Holding Investment Corporation, a Florida corporation, was part

of the criminal enterprise because the fraudulent loan proceeds from the Popular Bank and Trust Company and the Northside Bank obtained by defendant were deposited into an account held by Capital Holding Investment Corporation at Intercontinental Bank in Miami. The Capital Holding Company, S.A. and the Capital Holding Investment Corporation were used interchangeably by the defendant and were part of the criminal enterprise.

15. Tall Pines Trailer Park, located at 4250 S.W. 8th Street, Miami, Florida, was owned by Capital Holding Investment Corporation and received proceeds of fraudulently obtained loans from Popular Bank and Trust Company. These proceeds were traced to the operations of Tall Pines Trailer Park.

16. Gables-At-Miller Corporation is a Florida corporation owned and operated by defendant. Certain lots, located near 58th

Avenue and Miller Road, known as Gables Edge, were owned by Gables-At-Miller Corporation. At trial, the Government showed that Gables-At-Miller received $52,012.32 as proceeds from the Popular Bank and Trust Company, Ltd., loans. Further, the Government traced $23,833 from Popular Bank and Trust Company, Ltd., loans. Further, the Government traced $23,833 from Popular Bank and Trust Company, Ltd., through Capital Holding Investment Corporation directly to Gables-At-Miller Corporation. These proceeds were profits of the defendant's scheme to defraud. Moreover, Fidelity Bank in? Miami extended a $44,722.01 loan to the defendant in 1978, based on the pledging a $100,000 Fidelity Certificate of Deposit that had previously been pledged to the Popular Bank and Trust Company, Limited, in support of a $200,000 loan to Security International Insurance Company. The Court finds that this

Certificate of Deposit had been pledged to Fidelity without being properly released from the Popular Bank and Trust Company, Limited, thus defrauding that institution of $100,000 worth of collateral. The Court further finds that the defendant's illicit benefit regarding the $4,722.01 derives from the fact that the loan was obtained as a result of a pattern of racketeering activity. In sum, these transactions resulted in the defendant obtaining the benefit of $120,567.33 through a pattern of racketeering activity regarding Gables-At-Miller Corporation.

17. North America Warranty Investment Corporation is a Puerto Rican corporation fully owned and controlled by the defendant. As such, North America Warranty Investment Corporation was also part of the criminal enterprise as defined in Count 13 of the Indictment. Two loans totallying $220,000 from Popular Bank and Trust

Company, Limited, were given to North America Warranty Investment as part of the defendant's scheme to defraud. These proceeds ultimately directly benefited the defendant. Specifically, he used these proceeds to finance the construction of the Kohly Shopping Center.

18. The Northside Bank of Miami is part of a criminal enterprise defined in Count 13 of the indictment. The defendant owned 56% of the stock of the Northside Bank of Miami. Through his ownership interest, the defendant caused the Northside Bank to lend $76,649.95 to Kohly Motor Credit Corporation, a business also owned and controlled by the defendant. These loan proceeds were then diverted to other companies controlled by defendant and to pay for Kohly Shopping Center expenses. Popular Bank and Trust Company, Ltd., another business owned by defendant, loaned $1,300,000 to the defendant in order for him

to purchase a 56% interest in Northside Bank.

19. Security International Insurance Company was not a legal entity, but was as association in fact owned and controlled by the defendant. The defendant attempted to incorporate Security International Insurance Company in the Netherland Antilles, but legal formalities were never completed. The Security International Insurance Company was also named as part of the criminal enterprise in Count 13 of the indictment. Security International Insurance Company received the proceeds of a $200,000 loan from the Popular Bank and Trust Company, as part of the scheme to defraud. The defendant received all the proceeds of the Security International Insurance Company loan. Subsequently, the proceeds of the Security International Insurance Company loan went to satisfy a Fidelity Bank of Miami loan of $186,880.60 made to Capital

National Investment Corporation, a corporation fully owned and controlled by defendant. The remaining cash funds went directly to the defendant.

20. As stated previously, the Popular Bank and Trust Company was owned and controlled by the defendant. While the defendant initially was to receive 95% of the shares of that company's outstanding stock, the defendant in reality owned 100% of the stock since the remaining 5% was never transferred to its prospective owner, co-defendant's criminal enterprise. The Popular Bank and Trust Company and its depositors, as well as the Bank of Miami, were defrauded by the defendant. Consequently, the bank was forced to close as result of defendant's failure to repay his companies' debts. As a result of the defendant illegal activity, the Government now seeks a personal money judgment against the defendant in that amount which

represents the total cash proceeds of the loans and overdrafts described in the indictment.

21. In sum, the evidence adduced at trial and at the post-trial forfeiture hearing showed that all of the corporations listed above were corporate shells utilized by the defendant to conduct a racketeering enterprise. The evidence clearly showed that the defendant was himself the core entity who used the above described banks, corporations, and business associations as masks for his own illicit activities.

CONCLUSIONS OF LAW

1. The Government is authorized to seek forfeiture of defendant's assets by the provisions of 18 U.S.C. §1963(a)(1) and (a)(2). The Government predicates forfeiture on both statutory provisions.

2. Under 18 U.S.C. §1963(c)(1), the Government seeks forfeiture of any interest the defendant has acquired or maintained in

violation of the RICO Act, 18 U.S.C. §1963. The definition of "interest" in section 1963(a)(1) includes the income, profits, or proceeds of a pattern of racketeering activity. United States v. Martino, 681 F.2d 952 (Former 5th Cir. 1982) (en banc], aff'd sub. nom. Russello v. United States, ___ U.S. ___, 104 S.Ct. 296 (1983). Under 18 U.S.C. §1963(a)(2), the Government seeks forfeiture of any interest in the enterprise or any property right affording a source of influence over the enterprise. Taking both sections together, the forfeiture statute provides the Government with authority to forfeit any interest acquired in violation of the RICO Act or any interest affording a source of influence over the enterprise, whether or not illegally acquired. See Russello, supra at 301. Thus, Congress had provided the Government with extremely broad remedial powers to retrieve assets illegally obtained

through a pattern of racketeering activity.

3. The defendant opposed forfeiture arguing that (a) the Government failed to allege properly the "extent" of the forfeitable property as required by Fed.R.Crim.P. 7(c); (b) racketeering proceeds which are not re-invested in the enterprise are not forfeitable under RICO; (c) only defendant's "present" interests in the enterprise are forfeitable under the statute; (d) the Government may not seek a monetary judgment representing racketeering proceeds, but must instead trace the proceeds to specific assets; and (e) the type of monetary judgment sought by the Government in this case violates the Eighth Amendment. While the defendant has raised several issues worthy of serious consideration, the Court concurs with the Government that it is entitled to an in personam judgment against the defendant for the total amount sought, notwithstanding the

Government's inability to directly trace the proceeds to specific assets. The defendant remaining objections were also without merit.

4. Initially, the Court notes that forfeitures under the RICO statute are in personam, that is, imposed directly on an individual as part of a criminal prosecution, rather than in a separate proceeding in rem against the property subject to forfeiture. United States v. Huber, 603 F.2d 387, 896 (2d Cir. 1979) cert. denied, 445 U.S. 927 (1980). Thus, it is not the item of property itself that is the subject of forfeiture; rather, the forfeiture runs to the individual who committed the offense in question. It is a punishment imposed on a guilty defendant, not on a particular piece of property. "It deprives that defendant of all of the assets that allow him to maintain an interest in a RICO enterprise, regardless whether those

assets are themselves "tainted" by use in connection with the racketeering activity." United States v. Cauble, 706 F.12d 1322, 1349 (5th Cir. 1983). Accordingly, the Government may obtrain a judgment of forfeiture against this defendant personally.[2]

5. Individuals, corporations and other entities assocated in fact may constitute a RICO enterprise. United Staes v. Huber, supra at 393-94; cf. United States v. Turkette, 452 U.S. 576, 101 S.Ct. 2524 (1981). "Interest," in its usual meaning and as used in the RICO criminal forfeiture provision, encompasses all forms of property, including profits and proceeds. Russello v. United States, supra at 299. Real property, just like any other "interest," may be subject to criminal forfeiture. Id.

6. The Government is not required to trace proceeds acquited in violation of RICO

and identify them in their current form at the time of the judgment. The defendant's argument that the indictment failed to allege the extent of his forfeitable interest in the racketeering enterprise is without merit. Adequate notice was given the defendant in the indictment that his property was subject to forfeiture:

> The purpose of the notice of forfeiture in the Indictment is to inform the defendant that the government seeks forfeiture as a remedy. Barebones pleading sufficies so long as it puts the defendant on notice that the government seeks forfeiture and identifies the assets subject to forfeiture with sufficient specificity to permit the defendant to marshal the evidence in their [sic] defense. United States v. Cauble, supra, at 1347 (footnotes omitted.)

Count 13 of the indictment specifically listed the corporations and business entities in which the defendant had ownership interests and asserted that these

interests were subject to forfeiture under section 1963. The indictment thus informed the defendant that the Government sought to forfeit all his interests in these business concerns.

7. Defendant next contends that the only property or interest subject to forfeiture under RICO are those interests in or over any enterprise. Defendant argues that property or interests derived from racketeering profits are not reached by the statute because they were not component parts of the racketeering enterprise. The Court, however, takes the view that the forfeiture statute should be construed broadly to reach assets of the defendant that were not part of the original enterprise, but were acquired through the profits or proceeds of the enterprise. This follows the more recent cases consturing the reach of the RICO forfeiture provision. Russello, supra, Martino, supra.

8. Moreover, in this case, the Government hs proved to the Court's satisfaction that the contested entities were either integral parts of the racketeering enterprise or they were acquired with the proceeds of the racketeering enterprise. In other words, the term "interest" contained in the statute is broad enough to include profits or income derived from the enterprise and invested in other property. Russello, supra.

9. Defendant next argues that only his present personal interests in the enterprise are forfeitable under the statute. He contends that his past interests as an officer or shareholder of the corporations listed in Count 13 are not reached by the statute. The Court cannot accept defendant's position. Instead, the Court adopts the Government's position that if the forfeitable proceeds have been spent, invested or transferred to an innocent third

party, those particular funds may not be diverted, but the defendant remains personally liable for that dollar amount from this current assets.

10. Accordingly, this criminal in personam forfeiture is a personal action against the defendant himself, rather than a lawsuit against the tainted property. United States v. Huber, supra. The judgment of criminal in personam forfeiture, like any other criminal peanlty, follows the defendant. Because the judgment is directed against the criminal offender and not the offending property, the proceeds of all of defendant's property, whether or not traceble to the criminal enterprise, can be used to satisfy the judgment.

11. Defendant last contends that an in personam money judgment of the amount sought by the Government would amount to cruel and unusual punishment in violation of the Eighth Amendment. This argument has been

considered and rejected in the forfeiture context. See United Staes v. Tunnell, 667 F.2d 1182 (5th Cir. 1982); United States v. Grande, 620 F.2d 1026 (34th Cir. 1980); United States v. Huber, supra.

12. Accordingly, proceeds of loans and overdrafts made by Popular Bank and Trust company, Limited, wholly owned by the defendant, and Northside Bank of Miami, partially owned by the defendant, to business entities controlled by the defendant, as nominee borrowers, constitute income, profits and proceeds obtained from a pattern of racketeering activity. This Court therefore shall declare the sum of $3,203,045.42 forfeited by the defendant to the United States pursuant to 18 U.S.C. 1963(a)(1) and shall enter judgment in that amount in favor of the United States against the defendant Andres F. Rodriguez.

13. Further, the defendant's ownership and controlling interests in the above

enumerated business entities and real properties afforded the defendant a source of influence over the charged enterprise. This Court therefore shall declare the defendant's interest in those entities and properties forfeited to the United States pursuant to 18 U.S.C. 1963(a)(2) and shall enter judgment in favor of the United Staes against defendant, Andres F. Rodriguez.

14. A Final Jugment of Forfeiture will be entered by separate order.

DONE AND ORDERED in Chambers at Miami, Florida this ___ day of April, 1984.

JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

(FOOTNOTES ARE CONTAINED ON A SEPARATE PAGE)

copies furnished to:

Carol Wilkinson, Esq., AUSA
James D. McMaster, Esq.
Ronald Polk, Esq., FPD
Edward H. Carhart, Esq.
Jose Larraz, Esq.
John W. Perose, Esq.

Footnotes

1 These findings of fact and conclusions of law are directed exclusively to the RICO forfeiture issue. Beacuse the Court is making this determination, not a jury, the special verdicts required by Fed.R.Cr.P. 31(e) are not necessary. Pertinent findings included in a special verdict are incorporated in this order and made a part hereof.

2 The Court notes that there is presently pending before Congress a bill that would amend 18 U.S.C. §1963 to clarify Government's right to proceed in personam against a defendants property, wherever situated. S. 948, 98th Cong., 1st Sess. (1983).

APPENDIX C

UNITED STATES of America,
Plaintiff-Appellee,

v.

Francisco Humberto NAVARRO-ORDAS,
Jose Jane, Haydee Alvarez de
Rodriguez, Andres Felipe
Rodriguez-Ortega,
Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Andres Felipe RODRIGUEZ-ORTEGA,
Defendant-Appellant.

Nos. 83-5233, 84-5281.

United States Court of Appeals,
Eleventh Circuit.

Sept. 10, 1985.

Defendants were convicted in the United States District Court for the Southern District of Florida, James W. Kehoe, J., of various offenses arising out of alleged mail and wire fraud, and they appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) the evidence sustained the convictions; (2) the district court was not required to conduct a hearing on the defen-

dants' claim that grand jury materials were improperly disclosed; and (3) the forfeiture order entered against one defendant under the Racketeer Influenced and Corrupt Organizations Act was proper, even though the Government was able to trace only a small portion of the proceeds of the illegal activity.

Affirmed and remanded.

John W. Persse, Sarasota, Fla., for Francisco Humberto Navarro-Ordas.

James McMasters, Miami, Fla., John F. Evans, Zuckerman, Spaeder, Taylor & Evans, Richard Strafer, Coral Gables, Fla., for Haydee Alvarez de Rodriguez and Andres Felipe Rodriguez-Ortega.

Larraz & Larraz, P.A., Jose J. Larraz, Miami Fla., for Jose Jane.

Charles W. Blau, U.S. Atty., U. S. Dept. of Justice, Washington, D. C., Carol Wilkinson, Asst. U. S. Atty., Miami, Fla.,

Vincent L. Gambale, Criminal Div., U.S. Dept. of Justice, Washington, D. C., for the U. S.

Appeals from the United States District Court for the Southern District6 of Florida.

Before RONEY and TJOFLAT, Circuit Judges, and BROWN*, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

During a six month period in 1977 and 1978, the appellants, Andres Felipe Rodriguez-Ortega, Haydee Alvarez de Rodriguez, Francisco Humberto Navarro-Ordas, Jose Jane, and others[1] obtained over $3 million in fraudulent loans from three Miami, Florida, banks. When the fraud was dis-

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*Honorable John R. Brown, U. S. Circuit Judge for the Fifth Circuit, sitting by designation.

[1]The others named in the indictment were Carlos Santos Penin Dominizis (referred to in this opinion as Carlos Penin), Magaly Rodriguez Cintron, and Sara Moreno. Penin was tried with appellants and convicted, but is not a party to this appeal. Cintron plead guilty prior to trial, and Moreno became a fugitive and is still at large.

covered, they were indicted[2] by a federal grand jury and convicted of mail[3] and wire[4]

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[2]The indictment contained 14 counts. Counts one through seven charged appellants with mail fraud. **See** 18 U.S.C. §1341 (1982); **infra** note 3. Counts eight through eleven charged them with wire fraud. **See** 18 U.S.C. §1343(1982); **infra** note 4. Count twelve charged appellants with conspiring to commit mail and wire fraud. **See** 18 U.S.C. §371 (1982); **infra** note 5. Count thirteen charged Rodriguez-Ortega with conducting the affairs of a business enterprise through a pattern of racketeering, the acts of racketeering being the mail and wire fraud described in counts one through eleven. **See** 18 U.S.C. §§ 1961, 1962(c) (1982); **infra** note 7. Count thirteen also contained a forfeiture notice, informing the defendant that, if he was convicted of racketeering, the Government would seek forfeiture pursuant to 18 U.S.C. §1963(a)(1), (2) (1982). Count fourteen charged Jane with making a false statement in a loan application to a bank whose deposits were secured by the Federal Deposit Insurance Corporation. **See** 18 U.S.C. §1014 (1982); **infra** note 7.

[3]18 U.S.C. §1341 (1982) provides:

§1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises ... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be

(Footnote Continued)

fraud and of conspiring to violate the mail and wire fraud statutes by utilizing the U.S. Postal Service and interstate wire communications to obtain the fraudulent bank loans.[5] Rodriguez-Ortega and Jane were convicted of other offenses as well. Jane was found guilty of making a false statement in applying for one of the bank loans;[6]

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delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[4]18 U.S.C. §1343 (1982) provides:

§1343. Fraud by wire, radio, or television.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representation, or promises, transmits or causes to be transmitted by means of wire...communication in interstate...commerce, any writings...for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[5]18 U.S.C. §371 (1982) provides:

§371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire...to commit any offense against the United States ...and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(Footnote Continued)

Rodriguez-Ortega was found guilty of racketeering[7] and ordered to forfeit[8] to the

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[6]18 U.S.C. §1014 (1982) provides:

§1014. Loan and credit applications generally; renewals and discounts; crop insurance.

Whoever knowingly makes any false statement or report, or wilfully overvalues any land, property or security, for the purpose of influencing in any way the action of...any bank the deposits of which are insured by the Federal Deposit Insurance Corporation...upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

[7]18 U.S.C. §1962(c) (1982) provides:

§1962. Prohibited activities.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debts.

"Racketeering activity" includes mail fraud and wire fraud as defined in 18 U.S.C. §§1341, 1343.

[8]Forfeiture was ordered pursuant to 18 U.S.C. §1963(a)(1), (2) (1982) which, although it has been subsequently amended, **see** 18 U.S.C.A. §1963(a)(1) (West Supp.1985), was in force at the time of the district court's order. Section 1963(a) provided:

§1963. Criminal penalties.

(a) Whoever violates any provision of

(Footnote Continued)

United States the sum of $3,203,045.42, the proceeds of his illegal activity.[9]

These consolidated appeals are from appellants' convictions and from the order of forfeiture, respectively. Appellants question the sufficiency of the evidence to support their convictions and several of the trial court's rulings. Concluding that the Government's proof established each of the crimes charged and that appellants received a fair trial, we affirm their convictions. With respect to the order of forfeiture, the Government concedes a possible error in the

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section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of claim against or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

[9] Following the jury's conviction of Rodriguez-Ortega for racketeering, the district judge tried the forfeiture issue.

court's calculation of the amount of Rodriguez-Ortega's liability; accordingly, we remand the order so the error, if any, can be corrected.

1.

A.

The fraudulent scheme in this case dates back to 1975, when appellants Rodriguez-Ortega (Andres Rodriguez) and DeRodriguez (Haydee Rodriguez), his wife, traveled to the Netherlands Antilles and organized three banks: First National Mortgage Bank, North American Bank and Trust Company, and Caribbean Mortgage Bank. None of the three ever did any banking business; they were mere corporate "shells." Nonetheless, they played a significant role in the appellants' subsequent crime spree.

With these corporate charters in hand, Andres Rodriguez set out to purchase an existing bank in south Florida. He contacted Gonzalo Ruiz, a bank executive he

knew in Miami, and broached the idea of going into the banking business together; Rodriguez would own the bank and Ruiz would run it. Ruiz liked the idea, and he and Rodriguez searched the area for prospects. The Northside Bank of Miami was for sale and negotiations ensued. The price proposed by the bank's shareholders, $3.1 million, was beyond the Rodriguezes' resources, however, so a syndicate of local investors was formed to provide some equity capital.

In March 1977, the syndicate, led by Andres Rodriguez, signed a contract to buy the Northside Bank for $3.1 million. The contract called for a $450,000 cash down payment, which was made, and $2.65 million in cash at the closing, which would take place the following February. The Bank of Miami tentatively agreed to finance $1.3 million of this sum on three conditions: (1) after the acquisition Ruiz would become the Northsid3e4 Bank's chief executive officer;

(2) each member of the syndicate would guarantee the $1.3 million loan and pledge his bank stock as collateral; and (3) Rodriguez would pledge as additional collateral his interest in some Puerto Rican real estate which he falsely represented to the Bank of Miami was worth $1 million.[10] The syndicate, and Ruiz, agreed to these conditions, and, in June, the Bank of Miami issued a formal commitment to make the loan.

While they were negotiating this loan commitment with the Bank of Miami, Andres Rodriguez and Ruiz learned that the bank's parent corporation, Bank of Miami Holding Company, wished to sell one of its small off-shore banks, Popular Bank & Trust Co.,

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[10] Rodriguez represented to the Bank of Miami that he owned 8 acres of land in Puerto Rico and gave the bank an appraisal indicating that the parcel's fair market value was $1 million. In truth, Rodriguez had purchased the land for $120,000; he had not paid for it; and the sellers were in the process of foreclosing the purchase money mortgage Rodriguez had given them.

Ltd., a Cayman Island company.[11] Popular Bank & Trust had been formed to accommodate the Bank of Miami's foreign customers who desired the security of large American bank but did not want to place their money in an institution domiciled in the United States. Popular Bank & Trust had deposits of approximately $6 million.

Appellant Navarro-Ordas (Navarro), an officer of the Bank of Miami, handled Popular's day-to-day operations from an office located at the Bank of Miami. Navarro received deposits from foreign customers, placing them in Popular's account at the Bank of Miami, and issued in exchange Popular Bank & Trust certificates of deposits (CD's). He had no authority to lend

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[11]Actually, Popular Bank & Trust Co., Ltd. was owned by Popular Bankshares Corporation, a registered Florida bank holding company, which in turn was owned by Bank of Miami Holding Company. For ease of discussion we treat the two holding companies as one.

money, except to depositors who provided Popular CD's as collateral. Any other transaction had to be expressly authorized by the president of the Bank of Miami.

Andres Rodriguez decided to buy Popular Bank & Trust to complement the Northside Bank. Rodriguez' plan was to own ninety-five percent of the bank's stock and to give Ruiz the remaining five percent for his efforts in consummating the transaction. On November 15, 1977, they entered into a contract to purchase 100% of Popular's issued and outstanding stock for $150,000, $100,000 to be paid in cash and $50,000 to be paid in the form of a 180-day promissory note executed by the purchasers and secured by a certificate of deposit acceptable to the seller. The closing, as we recite **infra**, took place on February 15, 1978, six days before the closing of the Northside Bank acquisition.

On October 6, 1977, forty days before

he executed the contract to buy Popular Bank & Trust, Rodriguez began borrowing substantial sums from that bank. Navarro handled each transaction. The loans were made either to corporate shells Rodriguez had set up or to going business enterprises he controlled. The first loan, for $30,000, was made to Capital National Investment Corporation, a Panamanian company. Rodriguez secured the loan by pledging a $30,000 CD issued by the Fidelity National Bank of Miami. The second loan, dated November 4, 1977, for $200,000, went to Security International Insurance Corporation. It was also secured by a Fidelity National Bank CD. Navarro had no authority to make these loans, even though they were fully secured by genuine CD's, because neither corporate borrower had funds on deposit at Popular Bank & Trust and the loans were not secured by Popular CD's. Nor did Navarro have any authority to make the loans that followed.

They, too, were made to non-depositors; moreover, they were "secured" by worthless collateral.

On November 10, Navarro loaned North American Warranty Investment Corporation, a Rodriguez company, $80,000 secured by a CD of one of the Netherland Antilles shells Rodriguez had organized in 1975, North American Bank and Trust Company. Shortly after this loan was made, Carlos Penin, a Rodriguez associate, entered the picture.

Penin was no stranger to fraudulent dealings. In December 1976, he had persuaded Raquel Morales, an acquaintance of his who lived in Venezuela, to purchase $350,000 worth of CD's from the Fidelity National Bank in Miami and to authorize him to reinvest the interest they earned in additional Fidelity National CD's. In April, 1977, Penin borrowed $250,000 from Fidelity National Bank and pledged Morales' CD's as collateral. Morales visited Miami

unexpectedly on December 19, 1977, and attempted to redeem her CD's. Her attempt was unsuccessful, of course, as they were still serving as collateral for Penin's loan. To get out of his predicament, Penin had to pay off his loan, immediately. He went to Andres Rodriguez, and Rodriguez sent him to Navarro at Popular Bank & Trust. By this time, Penin had joined forces with Rodriguez and Ruiz to purchase Popular.[12] Navarro promptly solved Penin's problem. Popular loaned Penin $350,000 in Morales' name, and took as collateral worthless CD's issued by First National Mortgage Bank, one of Rodriguez' Netherlands Antilles shells. Penin used $253,000 of the loan proceeds to retire his note at Fidelity and gave Rodriguez' Capital Holding Company the rest.

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[12] Rodriguez' and Ruiz' contract to purchase Popular Bank & Trust was amended on December 9, 1977, to include Penin as one of the buyers. Penin also joined the syndicate Rodriguez had formed to purchase the Northside Bank.

On January 6, 1978, Popular Bank & Trust loaned Capital Holding Company $210,000 and took some Capital stock, which had no discernible value, as collateral. On January 12, Capital Holding Company borrowed an additional $40,000; this time the collateral consisted of a CD issued by Rodriguez' Netherlands Antilles shell, Caribbean Mortgage Company. Jose Jane, Andres Rodriguez' brother-in-law and employee, eventually received the proceeds of this loan. Carlos Penin also dealt with Popular Bank & Trust on Januaqry 12. He took out a $100,000 loan in Raquel Morales' name and secured it with a valueless First National Mortgage Bank CD Rodriguez gave him. The loan proceeds were deposited to the accounts of two Rodriguez companies: Capital Holding Investment Corporation and North American Warranty Investment Corporation. On January 18, Rodriguez had Navarro loan North American Warranty Investment

Corporation $140,000. Again, Rodriguez pledged worthless First National Mortgage Bank CD's as collateral.

On February 15, 1978, Rodriguez and Penin purchased Popular Bank & Trust[13] and installed Navarro as its president. Ruiz, who was to receive a five percent stock interest for his efforts, declined to participate in the new venture because he had become increasingly uncomfortable about having Rodriguez as a partner. Ruiz did not sever his relationship with Rodriguez, however, for a justifiable reason. The Northside Bank acquisition was to be closed on

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[13] By this time, Popular Bank & Trust had indirectly loaned Rodriguez $896,000. $700,000 came from loans to his shell corporations or going businesses he owned or controlled and $196,000 came from loans Penin obtained. After the February 15 closing, Rodriguez obtained from Popular, in addition to the funds indicated in the text **infra**, $227,000 from checks he wrote on Capital Holding Company's account at Popular. Popular honored the checks even though Capital's account lacked sufficient funds to cover them. Rodriguez' son-in-law, Mariano Rivera, cashed $194,000 worth of these checks at the Northside Bank.

February 21, and the Bank of Miami's commitment to finance $1.3 million of the acquisition price was contingent upon Ruiz serving as the bank's chief executive officer. Ruiz had promised the Bank of Miami that he would take the job, and he felt obligated to continue.

The closing of the Northside Bank acquisition went forward as scheduled. The syndicate needed approximately $2.65 million to complete the transaction. The Bank of Miami, abiding by its earlier commitment, financed $1.3 million of that amount. Rodriguez provided the balance. Practically all of it came from Popular Bank & Trust; Navarro gave Rodriguez the proceeds of an unsecured loan for $1.3 million to Capital National Investment Company, one of Rodriguez' Panamanian shells. Rodriguez told those present at the closing that he raised the needed funds by mortgaging Kohly Shopping Center, one of his holdings.

Immediately following the closing, the Northside Bank acquired a new board of directors, elected by the syndicate members. Andres Rodriguez, the bank's largest shareholder, controlled the board. One of the board's first acts was to make Ruiz the bank's present; he was given full responsibility for the bank's operations, pursuant to the syndicate's commitment to the Bank of Miami. The board then installed Haydee Rodriguez and Navarro as vice presidents. It was not long before these two vice presidents and Andres Rodriguez got the bank into serious trouble.

In early March, Jose Jane, Rodriguez' brother-in-law, applied to the Northside Bank for a $78,000 loan on behalf of Kohly Motor Credit Corporation, a defunct Rodriguez enterprise, ostensibly for property improvements. He dealt with Ruiz. Jane provided Ruiz with a corporate financial statement falsely showing awsets of

almost $500,000 and projected income for 1978 and 1979 of $98,000 and $182,000, respectvely. Jane apparently knew a great deal about the automobile business, and he impressed Ruiz as a good credit risk. Ruiz submitted Jane's application to the bank's loan committee, composed of Ruiz and the Rodriguezes, and the loan was approved. The loan proceeds were quickly disbursed to Rodriguez entities.

Two and one half months later, Jane applied for a second loan to Kohly Motor Credit Corporation for $340,000. By this time, substantial animosity had developed between Ruiz and Andres Rodriguez, and the Rodriguezes had appointed Navarro to fill his spot on the loan committee. Ruiz was out of town on his honeymoon when Jane came to the bank, so Navarro handled his loan application. The loan was promptly approved. The professional bank staff who were loyal to Ruiz, senses a fraudulent transaction in

the making and refused to fund the loan. In fact, they summoned Ruiz back from his honeymoon to handle the situation. Ruiz immediately turned the loan papers over to the bank's attorney. This angered Andres Rodriguez, and he retaliated. He attempted to "pack" the board of directors with his relatives and to fire all of the bank's officers. He even hired guards to take physical control of the bank's facilities.

Rodriguez' action brought on a visit from Florida banking authorities. They conducted an audit and discovered that the bank's financial condition was rapidly deteriorating. To avoid a crisis, the state ordered the Bank of Miami to take control of the Northside Bank.

Meanwhile, Popular Bank & Trust was on the verge of collapsing. When depositors attempted to withdraw their funds, they were met by Navarro's evasive answers and feeble explanations as to why they could not have

their money. On one occasion, Navarro told a customer that Rodriguez was a "protection man" and would take care of the bank's depositions. The Federal Deposit Insurance Corporation, while auditing the Northside Bank, concluded that Popular was "affiliated" with Northside because of Rodriguez' joint ownership interests, and it seized Popular's books. Shortly thereafter, Popular Bank and Trust closed down.

B.

[1] To obtain the bank loans we have described, supra appellants admit they made use of the U.S. Postal Service and interstate were services, and they do not question that such use was sufficient to implicate the mail and wire fraud statutes as alleged in the indictment. What they challenge in this appeal is the sufficiency of the evidence to establish the other elements of the mail and wire fraud offenses.[14] Alternatively, they seek a new

trial, claiming that various trial court errors prejudiced their substantial rights.

II.

Appellants contend that the evidence was insufficient to support their convictions. In assaying the sufficiency of the evidence, we are mindful that the evidence need not have excluded every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt. United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unite B 1982) aff'd on other grounds, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983). Rather, we must be convinced that a reasonable inferences therefrom in the light

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14 Appellants also contend that the evidence was insufficient to support their conviction for conspiring to violate the mail and wire fraud statutes. See supra note 2. We do not refer to their contention in our analysis of the evidence, in Part II, infra, bearing on the substantive mail and wire fraud charges, but it is obvious from that analysis that the Government fully established the alleged conspiracy and that the point requires no further elaboration.

most favorable to the government, Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), could find the defendant guilty as charged beyond a reasonable doubt. United States v. Russo, 717 F.2d 545, 549 (11th Cir. 1983).

[2] Employing this standard, we assess the sufficiency of the prosecution's case against each appellant. We being with Andres Rodriguez. The evidence against Rodriguez was overwhelming as to each charge leveled against him. No point would be served in rehashing the facts we have recited in Part I.A., supra.

[3] Navarro asserts that he was an unknowing dupe in Andres Rodriguez' fraudulent scheme; hence, he could not have acted with requisite criminal intent. Navarro says that he was no more guilty than his superiors (all indicted) at Popular Bank & Trust who permitted him to make the loans in question. He points out that the

Government failed to present credible direct evidence that he intended to defraud the bank or its depositors. His argument is spurious; in determining the sufficiency of the prosecution's case, we make no distinction between circumstantial and direct evidence. United States v. Bell, 678 F.2d at 549.

[4] It is true that Andres Rodriguez may have deceived Navarro in many of their dealings; nonetheless, there was strong circumstantial evidence that Navarro knowingly and willingly participated in Rodriguez' scheme. The jury was entitled to conclude that Navarro, acting on his own initiative, made too many large loans based on fraudulent collateral for his profession of ignorance to be acceptable. Furthermore, Navarro stood to profit personally from the conspiracy; Rodriguez promised him al vice president's job at the Northside Bank and five percent ownership in Popular Bank &

Trust. That Navarro may have failed to appreciate the extend of Rodriguez' ability to manipulate his associates or the amount of losses that would probably occur was doubtlessly of no moment to the jury in the face of evidence that he knowingly made worthless loans to Rodriguez, holding one for $1.3 million to finance the Northside Bank acquisition, and, in return, get paid a handsome salary.

[5] Haydee Rodriguez contends that the jury convicted her only because she was married to Andres Rodriguez. She claims that she knew nothing of her husband's scheme, much less participated in it. The evidence, however, indicated that she played a significant role. The Rodriguezes' bookkeeper testified that Mrs. Rodriguez had an active part in managing the family's business affairs. She worked in the office, handled the books, and shared the decision making with her husband. She frequently

determined which shell corporation bank account would be used to pay their bills. Viewed as a whole, the evidence established that she knew that the fraudulent loans we have described helped to finance both bank acquisitions and the family's business ventures.

After the Northside Bank acquisition, Haydee Rodriguez became a vice president of the bank and a member of the board. She had an office at one of the bank's branches where she frequently dealt with customers. The jury could ignore her argument that she played a passive role at the bank and merely followed her husband's instructions. The most persuasive evidence of guilt, to our mind, is that she served on the Northside Bank's three-person loan committee. In this capacity, she approved the fraudulent applications Jose Jane submitted on behalf of a corporation she and her husband controlled for $418,000 in loans. Given her

intimate knowledge of the family finances, she must have known that the applications contained false information. The evidence strongly suggested that, had 8it not been for Ruiz' stubborn independence, she would have looted the Northside Bank's deposits just as her husband looted the Popular Bank's. In sum, there is no basis for disturbing the jury's verdicts against her.

[6] The Government's proof consisted primarily of the checks and loan documents evidencing the flow of money from the Popular and Northside banks of bank accounts controlled by Andres Rodriguez. The case against Jose Jane was the weakest because his name infrequently appeared on these documents and because Andres Rodriguez was the principal focus of the prosecution. The evidence did show, however, that Jane worked for Rodriguez, that from one of the Rodriguez' shell companies he received the proceeds of a $40,000 fraudulent loan

obtained from Popular Bank & Trust, and that he fraudulently applied for and received from the Northside Bank of $78,000 loan to Kohly Motor Credit Corporation, the proceeds of which went into Rodriguez' coffers. When Jane later applied for another loan to Kohly, Ruiz intervened and the loan did not go through.

In our view, the evidence permitted the jury to find beyond a reasonable doubt that Jane knew of the fraudulent scheme described in the indictment and joined in it willfully, with the intent to pursue its objectives. Moreover, by making the fraudulent loan applications we have cited, Jane took important steps in the achievement of those objectives. His claim that the evidence was insufficient to convict him accordingly fails.

III.

The Rodriguezes contend that one or more members of the prosecution team in this

case improperly disclosed grand jury materials to successive grand juries and to certain state authorities who were examining the bank fraud we have described supra. The Rodriguez moved the district court to dismiss the indictment for this reason, and they requested an in camera hearing to establish their allegations. The court denied the Rodriguezes' request and their motion to dismiss; they now claim this action constituted reversible error. We are not persuaded.

The Rodriguezes, to support their motion, submitted the affidavit of a government attorney, who was conducting another grand jury investigation, to the effect that he had disclosed "certain information gained during his investigation to State authorities who were looking into the Rodriguezes' control of the Northside Bank." They also alleged that another government attorney had "disclosed...various

grand jury documents and records" to a private party engaged in civil litigation against Andres Rodriguez.

[7,8] In United States v. Eisenberg, 711 F.2d 959 (11th Cir. 1983), we prescribed the procedure a district court should follow when faced with a **prima facie** showing that the government has improperly disclosed grand jury material. In the case at hand, we do not believe that the Rodriguezes made such a **prima facie** showing.[15] The government attorney's affidavit merely stated that he turned information over to state investigators and private persoms whom Rodriguez had defrauded; it did not state

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[15]The Government's response to the Rodriguezes' motion to dismiss the indictment stated that the district court ordered the disclosure of some grand jury materials pursuant to Fed.R.Crim.P. 6(e), and the entry of these orders is not disputed. We thus read the Rodriguezes' motion as referring to grand jury materials not covered by such orders. For the reasons that follow in the text, we conclude that the Rodriguezes did not make out a **prima facie** case of improper disclosure.

that grand jury materials were turned over. Government disclosure of information obtained from a source independent of grand jury proceedings does not constitute a violation of Fed.R.Crim.P. 6(e). In re Grand Jury Investigation, 610 F.2d 202, 217 (5th Cir.1980).[16]

[9] The district court did not need to inspect the grand jury material in camera to determine whether the Rodriguezes' allegations were true if, assuming their truth, the Rodriguezes were not entitled to the relief they requested. "[A] court must consider the nature of the relief requested and the extent to which it interferes with the grand jury process. A criminal defendant who seeks to obtain dismissal of an indictment...bears a heavy burden in attemp-

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[16]In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

ting to justify such relief." In re Grand Jury Investigation, 610 F.2d at 219 (footnote omitted). We will not disturb the district court's exercise of its supervisory power over the grand jury process or its duty to protect the constitutional rights of the defendant absent an abuse of discretion. United States v. Pabian, 704 F.2d 1533, 1537 (11th Cir. 1983). The alleged leaks, although perhaps detrimental to the Rodriguezes in civil litigation, simply did not prejudice them in this criminal prosecution. Accordingly, we find no error in the court's refusal to hold an evidentiary hearing to determine whether any grand jury materials were improperly disclosed and its rejection of the Rodriguezes' motion to dismiss the indictment.

IV.

Andres Rodriguez was convicted in part under the Racketeer Influenced and Corrupt Organizaqtions (RICO) chapter of the Organ-

ized Crime Control Act of 1970, 18 U.S.C. §§ 1961-1968 (1982).[17] That law makes it an offense "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate ... commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity..." 18 U.S.C.. § 1962(c). The RICO statute also provides that any person convicted under section 1962(c) forfeit to the United States "any interest he has acquired in violation of [that] section...." 18 U.S.C. § 1963(a)(1).[18]

Rodriguez was convicted because he conducted an enterprise, consisting of Popular Bank & Trust, the Northside Bank,

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[17]Certain sections have subsequently been amended. See 18 U.S.C.A. §§ 1961, 1963, 1964, 1966 (West Supp. 1985).

[18]See supra note 8.

and various family business ventures and shell corporations, through a pattern of racketeering activity, to wit: the acts of mail and wire fraud alleged in the indictment. The district court determined that, in conducting this enterprise, Andres Rodriguez received $3,203,045.42, the proceeds of the fraudulent loans he arranged, and ordered him to forfeit that amount to the Government. The court provided, in its forfeiture order, that the Government would have a lien on any property of the enterprise in which Rodriguez had invested such loan proceeds and that, in collecting the forfeited amount, the Government should give Rodriguez credit for the fair market value of the lien. The propriety of this provision is not in issue here.

Rodriguez challenges the forfeiture order on several ground, but only one merits extended discussion:[19] whether the RICO statute authorized the court to order him to

forfeit the dollar amount of the loan pro-

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[19]Rodriguez' other grands are: (1) the forfeiture order violated Fed.R.Crim.P. 7(c) and denied Rodriguez due process because the Government failed to give him ad3equate pretrial notice that the Kohly Shopping Center was subject to forfeiture and, in addition, that he might be ordered to forfeit a cash amount rather than specific, identified assets; (2) the forfeiture order must fail because the indictment failed to describe a RICO "enterprise"; it only alleged that the enterprise consisted of a group of corporate entities rather than living persons, as required by 18 U.S.C. §1961(4); and (3) the forfeiture order's requirement that Rodriguez provide the Government with a financial statement within 20 days to aid in effectuating the order violated his fifth amendment right against self-incrimination and was not authorized by the RICO statute. We reject these grounds, with these brief comments.

Rodriguez' first ground fails because the indictment fairly apprised Rodriguez that his interest in the Kohly Shopping Center, evidenced by his interest in Capital National Investment Corporation, which owned the center and was one of the Rodriguez companies comprising the racketeering enterprise, was subject to forfeiture under 18 U.S.C. § 1963(a)(1) (2). Fed.R.Crim.P. 7(c) did not require the Government to put him on notice that he might be subject to a cash forfeiture if given loan proceeds could not be traced to specific shopping center assets. Rodriguez' second ground fails because a group of corporations can be a "group of individuals associated in fact" within the meaning of the "enterprise" definition of 18 U.S.C. § 1961(4). United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979), cert. denied, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980). Rodriguez' third ground fails for two reasons. First, the Government was entitled to request, and the district court to (Footnote Continued)

ceeds he received as "profits" from his racketeering activity. Rodriguez maintains that the Government had a duty to trace these loan proceeds to specific assets he owned at the time the forfeiture order was entered, since only the assets he acquired with the loan proceeds were subject to forfeiture. The Government was able to trace only a small portion of such proceeds.

[10] At the heart of Rodriguez' argument is the notion that the Congress, in enacting RICO's forfeiture provisions, unwittingly carved out an exckeption for

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order, that Rodriguez provide the Government a financial statement, listing his assets, liabilities, and sources of income, to aid in collecting the forfeiture judgment. See Fed.R.Civ.P. 69. Rodriguez has never claimed, in the district court, that the fifth amendment precluded the court from granting the Government such relief; moreover, such a claim would be moot if Rodriguez were to pay the money in full before the financial statement is due. A "blanket assertion of [the fifth amendment] privilege is insufficient to relieve a party of the duty to respond to questions put to him...." SEC v. First Financial Group of Texas, 659 F.2d 660, 668 (5th Cir. 1981). Rodriguez must submit to examination, and, if he wishes to invoke the privilege, raise it in response to specific questions. Id.

those who, through carefully crafted subterfuges, are able to "launder" their ill-gotten gains so that they cannot be traced to specific, identifiable assets. We find no basis for such an exception. Under the ciscumstances presented here, the court could enter what amounted to a personal money judgment against the convicted RICO defendant.

The Supreme Court's dedicion in Russello v. United States, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983), controls this situation by analogy. See United States v. Conner, 752 F.2d 566, 576-77 (11th Cir. 1985). The sole issue in Russello was whether profits, as opposed to interests in the enterprise itself, were subject to forfeiture (under the same RICO provisions applied by the court below). The Court determined that "Congress intended 1963(a)(1) to extend beyond an interest in the enterprise" and to reach the sort of "pro-

fits and proceeds" Rodriguez garnered in this case. Russello, 464 U.S. at ____, 104 S.Ct. at 300-01 As the Court observed,

> [t]he legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots. Congress' statement of findings and purpose in enacting [RICO], is set forth in its § 1. This statement dramatically describes the problem presented by organized crime. Congress declared, "It is the purpose of this Act to seek the eradication of organized crime in the United States...by providing enhanced sanctions and new remedies to deal with the unlawful activities of organized crime.... The provisions of this title shall be liberally construed to effectuate its remedial purposes."

Russello, 464 U.S. at ____, 104 S.Ct. at 302 (citations omitted). The Supreme Court reasoned that to limit the district court's forfeiture power to the defendant's interest in the enterprise would be inconsistent with the purposes of the Act:

> The broader goal was to remove the profit from organized crime by separating the racketeer from his

> dishonest gains. Forfeiture of interest in an enterprise often would do little to deter; indeed, it might only encourage the speedy looting of the infiltrated company. It is unlikely that Congress intended to enact a forfeiture provision that provided an incentive for activity of this kind while authorizing forfeiture of an interest of little worth in a bankrupt shell.

Russello, 464 U.S. at _____, 104 S.Ct. at 303.

[11] The circumstances before us now are closely analogous to those in Russello. To limit the forfeiture to profits actually traced to assets Rodriguez held at the time the forfeiture order issued would simply provide an incentive for racketeers to engage in complicated financial transactions to hide their spoils. The legislative history leaves no doubt that, in the view of Congress, the economic power organized crime enjoys is derived from its huge illegal profits. To carry out Congress' intent, a court must order forfeiture

of the amount of the profits and place the burden of satisfying the order on the convicted defendant, regardless of what he may actually have done with his profits. To do otherwise "would mean that '[w]hole areas of organized criminal activity would be placed beyond the reach of the statute." Russello, 464 U.S. at ____, 104 S.Ct. at 301 (quoting United States v. Turkette, 452 U.S. 576, 589, 101 S.Ct. 2524, 2531, 69 L.Ed.2d 246 (1981)). In fashioning the forfeiture order in this case, the district court followed the spirit, if not the letter, of the law. United SWtates v. Conner, 752 F.2d at 576-77.

[12] In briefing his appeal, the Government discovered what it believes to be a minor error in the district court's calculation of Rodriguez' racketerring proceeds. Although the Government has not brought the matter to the district court's attention, it now believes that the amount

of the order should be reduced by $262,012.35, to $2,940,984.10. Thus, the casew should be remanded to the district court for the limited purpose of adjusting the amount of the forfeiture order.

V.

We have considered appellants' grounds for reversal and find that none warrants the relief they seek. Some of their grounds lack sufficient substance to merit any discussion. Accordingly, appellants' convictions in No. 83-5233 are AFFIRMED. In No. 84-5281, the case is REMANDED for the limited purpose of reconsidering the amount of the forfeiture order.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5233

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCISCO HUMBERTO NAVARRO-ORDAS, ET AL.,

Defendants-Appellants.

No. 84-5281

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANDRES FELIPE RODRIGUEZ-ORTEGA,

Defendant-Appellants.

Appeal from the United States
District Court for the Southern
District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
by Appellant Rodriguez-Ortega

(Opinion September 10, 1985, 11 Cir., 1985, ___ F.2d ___).
(October 21, 1985)

Before RONEY and TJOFLAT, Circuit Judges and BROWN,* Senior Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition is DENIED and the Court having been polled at the request of one of the members of teh Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it

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*Honorable John R. Brown, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

(Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE

REHG-6
(REV. 6/82)

APPENDIX E

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned or imprisoned not more than twenty years, or both, and shall forfeit to the United States, (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interset subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interst declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, of the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the

award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provision of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imnposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1979, 84 Stat. 943.)

APPENDIX F

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law--

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any--
(A) interest in;
(B) security of;
(C) claim against; or
(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collected inviolation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may

be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes--

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title, and interst in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona finde purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

* * * * * * * *

(m)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interst in the property that is the

subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interst in the property, the time and circumstances of the petitioner's acquisition of the right,title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to tes-

timony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

(A) the petitioner has a legal right, title, or interst in the property and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interst of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interst in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or

transferee.

(As amended Pub.L. 98-473, Title II, §§ 302, 2301(a)-(c), Oct. 12, 1984, 98 Stat. 2040, 2192.)